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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-8

J. B. O'CONNOR, M. D.,
Petitioner,

-v-

KENNETH DONALDSON,
Respondent.

REPLY BRIEF FOR PETITIONERS PURSUANT TO RULE 24(4)

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In his response to the Petition for Writ of Certiorari, Respondent raises an issue not previously raised. Petitioner submits this Reply Brief pursuant to Rule 24(4), Rules of the Supreme Court, to discuss that issue alone.

In the Petition for Writ of Certiorari, Petitioner argued that the facts demonstrated that Respondent Donaldson, a Christian Scientist, had repeatedly refused various forms of previously beneficial treatment and had, therefore, assuming there exists a constitutional right to treatment, waived his right to treatment. Respondent argues in response that neither he nor any other involuntarly mental patient, committed

following a judicial determination of incompetence should be considered mentally competent to waive such a right.

The trial court instructed the jury that Donaldson's refusals of treatment should be considered. However, when that point was raised on appeal by the co-defendant Gumanis, the Court of Appeals for the Fifth Circuit dismissed the "waiver" argument as "without merit." (493 F.2d at 531.)

Petitioner would argue that assuming there exists a right to treatment, certain mental patients should be considered to be competent to waive that right, regardless of a prior judicial determination of legal incompetency. This argument sounds completely inconsistent, but finds support in recent decisions.

In Winters v. Miller, 446 F.2d 65 (2nd Cir. 1971), cert. den. 404 U.S. 985, the Court of Appeals upheld the claim of a practicing Christian Scientist who was involuntarily admitted to a hospital and given medication over her continued objections. The court noted that the patient had never been judicially declared incompetent, but noted that where the patient's religious views pre-dated by some years any allegations of mental illness or incompetency and where there was no contention that the current mental illness in any way altered those views, there may well be no justification for ignoring the patient's wishes. The court noted the decision in In re Brooks Estate, 32

Ill.2d 361, 205 N.E.2d 435 (1965), wherein the Illinois Supreme Court ruled that where approaching death has weakened the mental faculties of a theretofore competent adult to a point where he may be properly declared incompetent, he may not be compelled by a state appointed conservator to accept treatment of a nature which would probably save his life, but which is forbidden by his religious views and which he has steadfastly refused even though aware that death would result from such refusal.

This theory was carred forward in Holmes v. Silver Cross Hospital of Joliet, Illinois, 340 F.Supp. 125 (N.D.Ill. 1972), wherein an administratrix brought suit under the Civil Rights Act of 1871 alleging that the civil rights of the decedent were violated when an appointed conservator authorized blood transfusions in spite of a prior request to the contrary by the deceased, made before losing consciousness. The court found that although the decedent was incompetent by reason of his state, that he was entitled to have his religious convictions honored in the absence of some substantial state interest. The court went on to suggest that a balancing test should be applied which would consider the status of any dependants and other factual information not before the court.

Petitioner submits that Respondent's theory that no person adjudged to be incompetent can knowingly and intelligently waive the asserted right to treatment must fail. Such a position forces treatment

on those who would not have it and in so doing tramples the constitutional rights of members of the very class sought to be protected.

The District Court placed the question of the effect of Respondent's refusals of treatment in the hands of the jury and the Court of Appeals rejected completely the theory of an incompetent asserting such rights. Petitioner would argue that the question of waiver is a crucial adjunct of the right to treatment argument and that neither the District Court or the Court of Appeals gave adequate consideration to this issue and its effect on the question of Petitioner's liability.

Conclusion

For these reasons, and those already presented in our Petition for Writ of Certiorari, we respectfully submit that this Court should grant certiorari in this case.

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Reply Brief for Petitioners Pursuant to Rule 24(4) was furnished, by mail, to EUGENE Z. DUBOSE, ESQ., New Hampshire Legal Assistance, 3 Water Street, Washua, New Hampshire 03060; BRUCE J. ENNIS, ESQ., New York Civil Liberties Union, 84 Fifth Avenue, New York, New York 10011; MORTON BIRNBAUM, ESQ., 225 Tompkins Avenue, Brooklyn, New York 11216; GEORGE DEAN, ESQ., Post Office Box 248, Destin, Florida 32541; KENT SPRIGGS, ESQ., 118 North Gadsden Street, Tallahassee, Florida 32301; and JAMES G. MAHORNER, ESQ., Department of Health and Rehabilitative Services, 1323 Winewood Boulevard, Tallahassee, Florida 32301, this 2ND day of October, 1974.

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